

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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WALI BENNETT : NO. 00-409

MEMORANDUM

Dalzell, J.

September 20, 2000

On June 15, 2000, Wali Bennett took the Metroliner from New York to Philadelphia, arriving at 30th Street Station at around 11:30 a.m. Upon arrival, his appearance and behavior in the station attracted the attention of drug enforcement agents. After some conversation between the agents and Bennett, the agents conducted a search of Bennett's bags. They found fifteen bricks of cocaine, with a total weight of 16.6 kilograms. Bennett was then taken into custody, where he remains.

Bennett's Indictment charges that he knowingly and intentionally possessed with intent to distribute more than 5 kilograms of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A).

Bennett moves to suppress the items seized from him on June 15. Specifically, he seeks to suppress fifteen clear plastic Zip-lock bags, each containing a white brick-shaped object wrapped in white paper towels; a black and blue "CT" roller suitcase containing various articles and allegedly containing ten bricks of suspected cocaine; and one red and black

backpack containing various articles and allegedly containing five bricks of suspected cocaine.

I. Underlying Facts

We yesterday heard the testimony of DEA Special Agent David B. Hughes, which confirmed and expanded upon the DEA Form 6 he completed on June 15. We also heard from Agent Hughes's partner that day, Terrance Bowman, who is specially assigned to the DEA from the Pennsylvania Attorney General's Office.

At the conclusion of this testimony, the defendant himself took the witness stand and contradicted much, though not all, of the testimony of the two law enforcement officers.

Having been presented with important and irreconcilable conflicts in the testimony, we accept that of the law enforcement officers as far more credible than that of the defendant. The defendant's demeanor did not impress us as that of a credible witness. By contrast, the two officers were forthright and their responses to the searching cross-examination from defendant's able counsel confirmed their credibility for us. What follows, therefore, is based upon what we have found to be the credible testimony of Agent Hughes and Agent Bowman.

Around 11:00 a.m. on June 15, 2000, Agents Hughes and Bowman arrived at 30th Street Station on an unrelated investigation. Both agents were in plain clothes. At about 11:25 a.m., the Metroliner from New York arrived. At about 11:30 a.m., the agents observed that the last person coming up the

stairwell from the platform was a middle-aged black male, whose clothes and person were dirty and disheveled, at least as compared to the other passengers arriving on the same Metroliner.¹ He was carrying a dark suitcase and a red and black backpack both of which appeared new, and which did not match his personal appearance. The agents observed the black male stand at the top of stairwell number 5 and look to the left and to the right on several occasions. The black male appeared to make eye contact with the agents, and then headed towards the east entrance to the Station.² The agents saw that the male was walking at an unusually slow pace and was repeatedly looking over both shoulders.

The agents approached the male from behind, and made contact with him. The agents identified themselves by displaying

¹By his own admission, Bennett's description of his attire that morning - brown jeans "with spots on them" and a hole in the right leg - did not fit the profile of most who pay the rich premium of a Metroliner ticket.

²The defendant admitted to us that he has lived in Philadelphia all his life, and was on June 15 returning to his home at 268 South 60th Street. Given that his residence is in West Philadelphia, one might wonder why he would walk east rather than west to get to his home. If he were taking public transportation, in order to get to the Market Street Subway or to one of the Subway Surface routes, he would have to walk west. Although he could have gotten to a taxi on the east side, there is no rational reason why any lifelong resident of the City would add to the taxi fare by using the bank of cabs on the east side rather than on the west. We take judicial notice of these points of local interest because they underscore the likely inference that, as the agents testified, Bennett was deliberately walking away from them when he noticed that their eyes were upon him. This small point, therefore, is one of many indicia corroborating the credibility of the officers' testimony and undermining Bennett's.

their badges and photo identification and politely asked if they could speak to him. In response, the male turned to them and stated, "Yeah, what's up?" The agents initially noted the odor of alcohol on the male's breath. The agents also observed that the male was extremely and unusually nervous: he was trembling and the left side of his lip was twitching.

Agent Hughes asked the male for identification and the male responded that he had none, but stated that his name was Wali Bennett, with a date of birth of May 28, 1960. Agent Hughes then asked where Bennett was coming from and going to. Bennett responded that he was coming from Brooklyn, New York and was headed to his residence at 268 S. 60th Street in Philadelphia. Agent Hughes asked Bennett for his train ticket, but Bennett replied that he had left it on the train.

During this sequence of questions and responses, the agents noted that Bennett failed to make eye contact, kept his head lowered in a downward position, and stammered.³

Agent Hughes then reportedly spoke to Bennett about narcotics enforcement. He explained to Bennett that he and Agent Bowman worked for the DEA and their focus was to intercept the flow of narcotics. Agent Hughes informed Bennett that drugs are frequently transported by planes, trains, buses and cars, and also that he was familiar with drug couriers' methods used in

³Interestingly, Bennett avoided eye contact throughout his testimony before us, and spoke with his head looking down.

concealing narcotics. Agent Hughes also mentioned to Bennett that New York was a major drug source city for drugs.

The agents saw Bennett get progressively more nervous as this disquisition on the drug trade went on. They even noticed that Bennett's carotid artery was pulsating on the left side of his neck during the discussion.

Agent Hughes next asked Bennett if he had possession of any narcotics, weapons, or anything else illegal. Bennett reportedly responded that he had some alcohol that might be untaxed. At this point, Hughes and Bowman concluded that, based on the totality of the circumstances, there might be some criminal activity afoot.

Hughes then asked Bennett to consent to a search of his luggage. He said, "Mr. Bennett, do you have any problem with myself or Agent Bowman searching your luggage for narcotics or anything of an illegal nature?" Bennett replied, "Go ahead", handed Bowman the backpack, took a deep breath and lowered his head. The following colloquy ensued:

Agent Bowman: "Are you sure there is nothing else in here that you want to tell me about?"

Bennett: "There is something else in there".

Agent Bowman: "What, 'Coke'?"

Bennett: "Yeah, 'Coke'."

Agent Bowman: "One or two bricks?"

Bennett (lowering his head and sighing):
"It's a whole lot more than that."

Agent Hughes: "How many?"

Bennett: "Fifteen."

See DEA-6, p. 3, ¶ 6, attached to defendant's motion.⁴

At this point, the agents detained Bennett and escorted him to a bench in a secluded part of the east section of 30th Street Station. There, the agents conducted a hand search of the backpack, finding five bricks of cocaine. At about 11:40 a.m., Agent Hughes placed Bennett under arrest and gave him Miranda warnings in accordance with DEA Form 13. Hughes and Bowman then searched the suitcase, finding ten more bricks. Bennett was subsequently transported to the Philadelphia DEA office.

II. Analysis

A. Bennett Was Not "Seized" For Fourth Amendment Purposes

Bennett argues that his encounter with the agents constitutes a Fourth Amendment seizure that requires justification by probable cause, not merely reasonable suspicion. Consequently, he contends that the questioning at 30th Street Station constituted a custodial interrogation, which requires that the suspect be given his Miranda warnings. All agree he was not given such warnings during the encounter.

Bennett maintains that the contact with the agents was intrusive and was more than a "mere encounter" or "investigative detention". In particular, he contends that the agents commenced

⁴As noted above, in his testimony Agent Hughes explicitly adopted the statements he recorded when he prepared the DEA-6 on June 16.

a search at the point when they asked him if he was in possession of "narcotics, weapons, or anything of an illegal nature", and Bennett was not given Miranda warnings before this point. Further, Bennett notes that he did not initiate the conversation that led to his admissions.

That is to say, Bennett's contention is not just that his interaction with the agents was a seizure, but rather that he was effectively in full custody as a result of the encounter, such that Miranda warnings were necessary prior to any questioning. Because the Miranda warnings were not given, so the argument goes, the consent to the search and the items recovered are the fruit of the poisonous tree and must be suppressed.⁵

The Government contends that there was no seizure of the defendant at all, and therefore there is no need for a showing of reasonable suspicion, nor any need for the defendant to have been given Miranda warnings.

The parties agree that the standard for whether an individual is "seized" for purposes of the Fourth Amendment is set forth in Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382 (1991). As Bostick held:

Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few

⁵Bennett goes on to note that although there is an "independent source" doctrine as an exception to the "fruit of the poisonous tree" doctrine, there is nothing here to show that there was independent source justification for the search. The Government's response does not raise any argument with respect to this point.

questions. So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.

Bostick, 501 U.S. at 434, 111 S. Ct. at 2386 (internal quotation marks and citations omitted). The Court also held that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id., 501 U.S. at 434, 111 S. Ct. at 2386 (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)).

The Supreme Court has also held that contact between law enforcement agents and an individual, in which the agents "simply ask if [the individual] would step aside and talk with them", is a "consensual encounter that implicates no Fourth Amendment interest," Florida v. Rodriguez, 469 U.S. 1, 5-6, 105 S. Ct. 308, 311 (1984). While our Court of Appeals has questioned whether an encounter such as described in Rodriguez truly represents a situation where a reasonable person would feel free to ignore the agents and move on, it nevertheless concluded "we are not free to substitute our judgment on this question for the Supreme Court's," United States v. Thame, 846 F.2d 200, 202 (3d Cir. 1988).

On the other hand, the Supreme Court has also held that "[a]sking for and examining [the defendant's] [airline] ticket and his driver's license were no doubt permissible in themselves,

but when the officers identified themselves as narcotics agents, told [the defendant] the he was suspected of transporting narcotics, and asked [the defendant] to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that [the defendant] was free to depart, [the defendant] was effectively seized for the purposes of the Fourth Amendment," Florida v. Royer, 460 U.S. 491, 501, 103 S. Ct. 1319, 1326 (1983).

Thus, on the principles expressed in Bostick, to determine whether Bennett was "seized" for Fourth Amendment purposes during his encounter with the agents -- and in particular whether he was "seized" at the point where he was asked if he had any narcotics on him -- we must ask whether under the totality of the circumstances⁶ Bennett would not reasonably have felt free to leave or, conversely, whether the agents had by some show of authority or use of force restrained a reasonable, innocent person in Bennett's situation.

In support of its position, the Government cites to two Third Circuit cases with facts similar to ours in which our Court of Appeals found that agents' actions had not led to a "seizure". Because of these cases' significance, they deserve consideration in some detail.

⁶See United States v. Kim, 27 F.3d 947, 951 (3d Cir. 1994) ("In our assessment of the encounter, we must accord all factors an appropriate weight rather than treat any one factor as dispositive.")

The first case is United States v. Thame, 846 F.2d 200 (3d Cir. 1988), where the panel found that the defendant's consent to a sniff test of his luggage was voluntary during another 30th Street Station encounter. Specifically, Thame (a former Philadelphia police officer) was on an Amtrak train from Florida to Philadelphia, which arrived in Philadelphia at 30th Street Station. He was followed from the platform to the lobby by two agents who had been alerted to look for him by an Amtrak investigator. Once in the waiting area, one of the agents came up beside Thame, identified himself, and asked Thame if they could talk. Thame agreed, and upon questioning (while still walking along) told the agent his name and that he had just arrived from Florida. Upon request, Thame gave the agent his train ticket, coming to a halt in order to do so, and subsequently gave the agent his identification. At this point, a second agent came up and identified himself, and the agents explained that they were working in narcotics interdiction and were seeking cooperation from passengers from source cities like Miami and Fort Lauderdale. They then asked if Thame would consent to a search, but Thame declined. They next asked Thame if he would consent to a dog sniff of his luggage, and he agreed. On this, they also asked Thame to accompany them to the Amtrak police office for the search, and he again agreed. The dog alerted to Thame's baggage, a warrant was obtained on that basis, and drugs were found in Thame's luggage. See Thame, 846 F.2d at 201-02.

On these facts, the Thame panel found that the initial request for Thame's ticket and identification was permissible, especially in light of the fact that the agents did not restrain him, block his path, or otherwise control his movement by retaining his papers. See id. at 203. The panel also rejected Thame's claim that he had been "seized" prior to his consent to the sniff test -- in particular, his claim that he had become seized at the point where he refused the search of his bags. The panel concluded that Thame was not under custodial restraint when he consented to the sniff test, noting that the officers did not tell him that he was a suspect, but rather only told him that they were seeking cooperation from passengers arriving from source areas. See id.

It is hard to miss the congruencies of Thame's facts and those here. Indeed, an examination of the agents' behavior here, from the initial contact up through their discussion of their job in interdicting drugs, almost seems as if it were designed to follow the path the Thame panel approved. It is true that one difference in the behavior of the agents here from that in Thame is that the agents in this case asked Bennett if he had any illegal substances in the bags prior to seeking consent for a search, while in Thame the agents proceeded directly to request the search without asking the question regarding possession of illegal substances.

Bennett seeks to distinguish Thame, arguing that its facts are "not instructive" because Thame involved the question

of the defendant's consent to a dog sniff in a private setting⁷. While Bennett is correct that the ultimate issue in Thame was whether his consent to the dog sniff was voluntary, in the process of that analysis the Court of Appeals concluded that Thame was not seized prior to his consent. It is the similarity between the agents' approach to, and their initial questioning of, Thame and their approach to Bennett that to us makes Thame compelling.

The second "similar" case the Government cites is United States v. Kim, 27 F.3d 947 (3d Cir. 1994), in which the panel found that an encounter between an agent and a defendant on a train did not lead to a seizure. Specifically, Kim involved a DEA special agent who observed Kim and his friend Youn on an Amtrak train when it stopped at Albuquerque en route from Los Angeles to Chicago. The agent, accompanied by a second officer who subsequently stayed out of sight, went to the sleeper roomette that Kim and Youn occupied -- which, the panel noted, was in a relatively busy part of the train in terms of passenger foot traffic -- and knocked on the door. When the two occupants opened the door, the agent said, "How are you guys doing? I'm with the police department," and showed his badge to Kim and Youn. During the subsequent conversation, the agent knelt in the

⁷On the other hand, Bennett does extensively quote the dicta from Thame, noted above, that casts aspersions on the Supreme Court's finding in Rodriguez that a reasonable person greeted by federal agents asking for identification would feel free to walk away. Like our Court of Appeals, we, too, must follow the Supreme Court on this issue.

hallway, but did not block the doorway or enter the roomette. The agent inquired as to the men's origin, destination, and residence, and then asked for their tickets, which the men produced. The agent then told the men that he worked for the DEA and that there had been problems with people smuggling drugs out of LA on the train. Whereupon the agent asked, "You guys don't have drugs in your luggage today, do you?". Kim said, "No". The agent then asked, "Would you voluntarily consent for me to search", and Kim answered, "Sure". The agents found drugs in the luggage, sealed in cans marked "Naturade All-Natural Vegetable Protein". See Kim, 27 F.3d at 949-50.

On these facts, the panel majority found that there was no seizure.⁸ In discussing the encounter, the majority noted that the agent was in plain clothes, did not show his weapon, and addressed the defendants politely.⁹ See id. at 951-52. The panel addressed the issue of the nature of the questions asked by the agent, a significant matter here:

Kim contends that [the agent] asked focused and potentially incriminating questions. When asked such questions, Kim argues, "an innocent passenger may well feel obligated to

⁸Judge Cowan's opinion was joined by the late Judge Hutchinson. Judge Becker dissented, arguing that the agent had in fact seized Kim because he confronted Kim in a non-public part of the train, blocked Kim's exit from the roomette, asked Kim "focused and incriminating questions", and never advised Kim that he could terminate the encounter, see Kim, 27 F.3d at 961.

⁹Another line of the analysis focused on the question, not present in this case, of whether the fact that the encounter occurred in a "confined" setting turned it into a seizure, which the panel resolved in the negative.

demonstrate innocence by cooperation," . . . and "a guilty passenger must feel terrorized and trapped." Kim points to a question that Small asked: "You guys don't have drugs in your luggage today, do you?" First, we do not believe this question was accusational. The tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry.

Secondly, what a guilty passenger would feel and how he would react are irrelevant to our analysis because "the 'reasonable person' test presupposes an innocent person." Bostick, 501 U.S. at 438, 111 S. Ct. at 2388. We do not believe an innocent person would feel compelled to cooperate with police by some potentially incriminating questions.

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We therefore hold that potentially incriminating questions do not by themselves make an encounter coercive. In so ruling, we note that Kim cites to only one question [by the agent], and thus the case does not present the scenario of repeated and persistent questioning of an individual, which was found to constitute an investigative stop in United States v. Savage, 889 F.2d 1113, 1117-18 (D.C. Cir. 1989) (some citations omitted).¹⁰

Kim, 27 F.3d at 953.¹¹

¹⁰The panel went on to reject Kim's claim that the way in which the questions were asked was coercive on evidence that the agent was polite and smooth in his delivery (the agent had tape recorded the encounter with Kim via a hidden recorder).

¹¹As noted above, Judge Becker dissented, arguing that the asking of these questions militated towards characterizing the encounter as a seizure. Judge Becker believed that when the agent asked the men if they had any drugs immediately after he had told them that he was a DEA agent looking for drug traffickers, the question transmitted the message to the men that they were suspects, see Kim, 27 F.3d at 965. Judge Becker also found that the blunt and direct nature of the questions,

(continued...)

Again, the Government stresses the similarity between Kim's facts and Bennett's. In particular, the Government points to the facts in both cases that the agents were in plain clothes, politely introduced themselves and asked to speak to the defendants. In both cases, the defendants voluntarily agreed to speak with the agents and the agents did not physically impede the defendants' movement.

Bennett seeks to distinguish Kim by arguing that because there is no claim here that the environment (in Kim, the train compartment) was itself inherently coercive, Kim does not inform our decision. However, as discussed above, the Kim majority was assessing all of the circumstances, of which the environment was only one. The panel majority also considered the agent's street clothes and polite demeanor, as well as the nature of the questions, in arriving at the conclusion that there was no seizure.

Kim stands for the proposition that an agent can indeed ask an "informational" question of the sort that Agent Hughes did here, namely asking if the suspect had any illegal materials. On the other hand, one distinction between Kim and Bennett's case is

¹¹(...continued)
notwithstanding that they were put in a polite tone of voice, made them inherently coercive, see Kim, 27 F.3d at 966. Judge Becker stressed that while perhaps no single one of the circumstances made the encounter a per se seizure, the totality of the circumstances did create a seizure; he also concluded that the agent had no basis for reasonable suspicion to do an investigative stop, so that the fact that the encounter was a seizure absent reasonable suspicion created a Fourth Amendment violation, see Kim, 27 F.3d at 966 n.5.

that the agent here did ask the question a second time before Bennett admitted that there was cocaine. This could conceivably fall into the "repeated question" category the Kim panel discussed in the passage quoted above, where it noted that repeated questioning might turn an encounter into an investigative stop.

On the totality of the circumstances, however, we conclude that Bennett was not "seized" here. The agents were in plain clothes, were evidently polite in their conversation, and did not physically prevent Bennett from leaving the station.¹² They never brandished their guns, or even exposed them. Indeed, the encounter occurred in that most public of places, the cavernous 30th Street Station, in the middle of a work day. The agents' behavior was, in all, very similar to what the agents did in Thame and Kim, which in both instances was found not to lead to a seizure.¹³

¹²The case presented here is quite distinct from that in Florida v. Royer, cited above, in which the Supreme Court found that a seizure had occurred. Here, for example, the agents did not retain Bennett's ticket or identification (for indeed he had none), nor did they take him to a police room. To the contrary, all of the relevant activity took place in the busy open space of a vast train station.

¹³While the agents did ask Bennett twice about his possession of contraband, we cannot see that this rendered the encounter coercive in such a way as to constitute a stop. Moreover, the second inquiry occurred after Bennett had consented to the search.

As Bennett was not seized, there is no Fourth Amendment issue regarding the agents' questioning nor regarding their request for a consent search.

B. Alternatively, This Was a Terry Stop

In response to Bennett's claim that he was seized, the Government argues that, even if he was, the agents had reasonable suspicion to believe that Bennett was engaged in criminal activity, and therefore could stop him, ask him questions, and gain his consent to the search. In particular, Bennett met the profile for a drug courier. Thus, even if there was a seizure, it was not in violation of the Fourth Amendment. Although Bennett filed a reply brief, he failed to argue that there was no reasonable suspicion.

"In Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L.Ed.2d 889, (1968), [the Supreme Court] held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot', even if the officer lacks probable cause," United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989). As justification for such a stop, the agent must be able "to articulate something more than an inchoate and unparticularized suspicion or 'hunch'," Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 (internal quotation marks omitted), as the Fourth Amendment requires some "minimal level of objective justification" for the stop, Id. (quoting INS

v. Delgado, 466 U.S. 210, 217, 104 S. Ct. 1758, 1763 (1984)). The standard for this sort of stop is less than that for probable cause, which itself has been defined as "a fair probability that contraband or evidence of a crime will be found," Sokolow, 490 U.S. at 7, 109 S. Ct. at 1585 (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).

As with the question of whether there was a seizure, our examination of the existence of reasonable suspicion is on an analysis of the totality of the circumstances¹⁴. Thus, the concept of reasonable suspicion is not readily reduced to a set of neat legal rules, see Sokolow, 490 U.S. at 7-8, 109 S. Ct. 1585.

In Sokolow, the Supreme Court held that the reasonable suspicion analysis was not changed -- which is to say that the Government need not make a greater showing -- when the defendant's behavior met a "drug courier profile", see Sokolow, 490 U.S. at 10, 109 S. Ct. at 1587. The Court found that while the agent must be able to articulate the factors that led him to the conclusion to stop the individual, the fact that such factors were set forth as part of a profile did not detract from their "evidentiary significance as seen by a trained agent," Sokolow, 490 U.S. at 10, 109 S. Ct. at 1587.

¹⁴"We have long held that the 'touchstone of the Fourth Amendment is reasonableness'. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39, 117 S. Ct. 417, 421 (quoting Florida v. Jimeno, 500 U.S. 248, 250, 111 S. Ct. 1801, 1803 (1991)).

Here, even before asking Bennett a single question, the agents observed that:

- he behaved in an unusual fashion upon arriving at 30th Street Station
- he carried brand new luggage which did not match his disheveled dress
- he was arriving on a train from a known drug source city
- upon making eye contact with the agents, he began to walk toward the eastern exit while looking repeatedly over both shoulders.

Upon approaching Bennett and asking for his ticket and identification, the agents further learned that:

- he had indeed traveled from New York
- he had left his ticket on the train
- he didn't have any identification.

According to the Government, Bennett met a profile for a drug courier, namely, that drug couriers often travel with false or no identification to conceal their identity, and often travel with new luggage, because the luggage is only used to carry the drugs, not for normal travel. Also, Bennett's visible nervousness, greater than that which might be expected of an average person in a train station, suggested that criminal activity might be afoot.

Miranda rights do not apply during a Terry-type investigative stop. "It is settled that the safeguards

prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest,' " Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520 (1983))¹⁵. Thus, even if this was a seizure, and an investigative Terry stop, the fact that the agents failed to give antecedent Miranda warnings would not render their subsequent questions impermissible.

Based upon the inconsistencies in Bennett's appearance, and his odd behavior, coupled with his conduct and nervousness when the agents initially approached him, the agents had reasonable suspicion to seize Bennett for the purposes of a Terry investigative stop, even before Bennett told them (in response to Special Agent Hughes's question) that he indeed had contraband in his bag. To the extent that he was so seized, there was, as noted above, no requirement that he receive Miranda warnings, nor any Fourth Amendment bar to the agents' request for a consent search.¹⁶

C. Consent To The Bags' Search

¹⁵Berkemer held that Miranda warnings are not required during traffic stops, which the Court noted were "analogous" to Terry stops, see Berkemer, 468 U.S. at 439, 104 S. Ct. 3150.

¹⁶We also explicitly find that to the extent Bennett was seized during the encounter leading to the search, it was certainly not to the level of a full custodial arrest, as he contends.

Bennett argues that the "overly coercive" atmosphere created by the agents rendered his consent to the search involuntary. Bennett's argument appears to be that irrespective of whether he was "seized", the consent the agents obtained was not voluntary so that the fruits of the search must be suppressed. In particular, Bennett notes that the agents never advised him that he was free to leave, but rather the agents' "custodial interrogation" began immediately after they accosted him. He contends that he does not have much experience with law enforcement (his criminal history check evidently came out negative), and his counsel suggests that he may have been impaired, given that the agents smelled alcohol on him. Thus, on the totality of the circumstances, Bennett claims his consent was not voluntary.

The Government agrees that we must look to the totality of the circumstances, but points to the facts that the agents did not physically restrain or coerce Bennett and that Bennett's permission to search was unambiguous.¹⁷ Thus, the Government concludes that the consent was indeed voluntary.

"[W]hen the subject of the search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

¹⁷That is, there is no credible evidence that once given, the consent was ever qualified or revoked.

Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S. Ct. 2041, 2059 (1973)¹⁸, see also Bostick, 501 U.S. at 431, 111 S. Ct. at 2384 ("We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.").

"[W]hether consent was given is to be resolved by examining all relevant factors, without giving dispositive effect to any single criterion. Certain factors that courts consider in determining whether confessions were voluntary, such as the age of the accused, his education, his intelligence, whether he was advised of his constitutional rights, and whether the questioning was repeated and prolonged are relevant to our examination." United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994) (citations omitted); see also Bustamonte, 412 U.S. at 229, 93 S. Ct. at 2049 ("In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken

¹⁸In Bustamonte, the defendant had argued that knowledge of the right to refuse the search was in fact a prerequisite for voluntary search; as seen in the passage, the Supreme Court disagreed.

of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.").

As noted above, the Government does not need to inform someone of his right to refuse a consent search before eliciting consent (although whether the defendant knew of his right to refuse is a factor we consider). Moreover, the agents need not inform a detainee that he is free to go prior to obtaining voluntary consent to search, see United States v. Robinette, 519 U.S. 33, 39-40, 117 S. Ct. 417, 421 (1996).

Examining these various factors in their totality, we note that Bennett was 40 years old at the time of the search. Bennett testified that he got up to twelfth grade at West Philadelphia High School, and there is nothing to suggest he had substandard intelligence or less than the experience one would expect of a middle-aged man -- to the contrary, he was an articulate, well-spoken (if not credible) witness before us. It is true that Bennett was not informed of his constitutional rights prior to requesting consent, or of his right to either walk away or to refuse the search. The agents, however, did not repetitively question him before obtaining consent, although they prefaced the request to search by asking if Bennett had anything illegal on him which, rather notably, Bennett answered in the affirmative, stating that he may have had some untaxed alcohol. While the agents did smell alcohol on Bennett's person and

breath, they testified that he did not appear intoxicated or impaired.¹⁹

The only reason that the encounter may have seemed "coercive" to Bennett was that he knew that he had fifteen bricks of cocaine in his bags. As noted above, it is well-settled that the hypothesized reasonable person in these cases is an innocent person. It is most unlikely that the atmosphere was indeed so coercive in that most public of places to render the consent involuntary. We therefore conclude that the consent was voluntary.

In sum, we conclude that the agents did not seize Bennett. To the extent that they did seize him, they were justified in doing so by reasonable suspicion, and in any event Bennett voluntarily consented to the search that disclosed the cocaine. We will therefore deny Bennett's motion to suppress.

¹⁹Bennett's counsel elicited no testimony from the defendant to show that he was impaired. By contrast, Agent Hughes, who as a Maryland State Trooper for over five years had much experience with DUI cases, credibly testified that Bennett showed no evidence of impairment from alcohol consumption.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
WALI BENNETT	:	NO. 00-409

ORDER

AND NOW, this 20th day of September, 2000, upon consideration of defendant's motion to suppress physical evidence (docket no. 22), and the Government's opposition thereto, and after a hearing yesterday, and for the reason set forth in the accompanying memorandum, it is hereby ORDERED that the defendant's motion is DENIED.

BY THE COURT:

Stewart Dalzell, J.